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U.S. Supreme Court Sides With Landowners in Clean Water Act Decision

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The U.S. Supreme Court ruled recently that property owners have the right to seek judicial review for regulatory determinations regarding "waters of the United States" under the Clean Water Act. The decision in *U.S. Army Corps of Engineers v. Hawkes Co., Inc.* is important because it reins in the government's regulatory jurisdiction under the Clean Water Act and signals the Supreme Court's willingness to limit expansion of the Act's "ominous reach."

In the wake of the court decision, landowners, farmers, developers and construction contractors will want to revisit whether they are required to secure permits for wetlands fill, as well as their strategies for doing so. Additionally, the decision speeds up the permitting timeline, saving applicants considerable time and expense.

The Supreme Court's Decision

The underlying District Court case raised the issue of whether a wetlands had a "significant nexus" to the Red River of the North, located 120 miles away. The District Court dismissed the case upon a determination that a revised Jurisdictional Determination (JD) from the U.S. Army Corps of Engineers (USACE) was not a "final agency action for which there was no other adequate remedy in a court." The Eighth Circuit reversed, and the U.S. Supreme Court granted certiorari.

The analysis turned on two conditions that must be satisfied for an agency action to be "final" under the Administrative Procedure Act. First, "the action must mark the consummation of the agency's decision-making process," and second, "the action must be one by which rights or obligation have been

determined, or from which legal consequences will flow." Chief Justice Roberts rejected the federal government's arguments that a party may proceed without a permit and argue in the government enforcement action that a permit is not required, based on a concern for civil and criminal liability risks. The government's second argument was that the applicant may complete the permit process and then seek judicial review if the application is denied. This was rejected due to the significant costs to the applicant. The Supreme Court affirmed the Eighth Circuit 8-0 on May 31, 2016.

Of significance was a full concurrence opinion by Justice Kennedy, joined by Justices Thomas and Alito, to "point out that, based on the Government's representations in this case, the reach and systemic consequences of the Clean Water Act remain cause for concern." Citing Alito's note in an earlier case: The Act's reach is "notoriously unclear, and the consequences to landowners even for inadvertent violations can be crushing."

What Does This Mean to You?

Landowners, farmers, developers and construction contractors have the right to challenge jurisdictional determinations from the USACE by appeal to federal District Court. This is early in the wetland fill and permitting process, which is very good news for the applicant. This case raises questions about the length of the USACE's reach under the Clean Water Act and, specifically, under the memorandum of agreement between the Environmental Protection Agency (EPA) and the USACE. Justice Kennedy points out that this memorandum of agreement "can be revoked or amended at the Agency's unfettered discretion." Kennedy concludes his concurrence by stating: "The Act . . . continues to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation."

This is an evolving area of waterway regulation, and it is important to note the jurisdiction of multiple levels of government agencies, including the federal government via USACE and the EPA; state government via the Wisconsin Department of Natural Resources' water quality standards, S. 281.11 Wis. Stats., and NR 103 Wisconsin Administrative Code; and local governments, including minimum wetland protection standards in the form of a shore land "overlay" zoning district adjacent to navigable streams and lakes, NR 115 (for counties) and NR 117 (for cities and villages), and specific wetland ordinances by local units of government.

Current Wisconsin wetland law includes exemptions for farming and forestry-related activities and provides jurisdiction to the State of Wisconsin for wetlands in so-called non-federal wetlands. Importantly, Wisconsin Act 6 allows for exemptions for fill applications of 10,000 square feet or less. Passed in 2001 by the Wisconsin Legislature, Act 6 addresses isolated wetlands not covered by Section 404 of the Clean Water Act as a result of the U.S. Supreme Court *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers* decision. The SWANCC decision

struck down the USACE's migratory bird policy that had historically been used to extend federal jurisdiction to isolated wetlands.

Contact Us

For more information about the wetland fill and permitting process, contact Donald Gallo, 262.956.6224, or another member of Husch Blackwell's Environmental team.